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No. 93-087

In The

Supreme Court of the United States

October Term, 1993

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

DANELLA CONSTRUCTION CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Counter Statement of the Case	1
Reason for Denying the Writ	3
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

American Centennial Insurance Co. v. Arion Insurance Co. Ltd., No. 88-1665, Slip Op. (S.D.N.Y. April 18, 1990)	6
Coenen v. RW Pressprich and Company, 453 F. 2d 1209 (2nd Cir. 1972), *cert. denied*, 406 U.S. 949 (1972)	6
LaValle Plaza, Inc. v. RS Noonan, Inc., 378 F. 2d 569, 37 A.L.R. 3rd 189 (3rd Cir. 1967)	6
Martin v. Younstown Sheet and Tube Company, 911 F. 2d 1239 (7th Cir. 1990)	5
Moses H. Cone Memorial Hospital v. Mercury Construction, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)	3, 4
Mutual Fire Marine and Inland Insurance Company v. Norad Reinsurance Company, Ltd., 868 F. 2d 52 (3rd Cir. 1989)	5

Contents

Page

Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) 4

Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) 3, 4

Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) 3, 4

Statutes Cited:

9 U.S.C. § 1 ..... 4, 6

9 U.S.C. § 2 ..... 4, 6

9 U.S.C. § 9 6

9 U.S.C. § 10 ..... 2, 6

9 U.S.C. § 11 ..... 2, 3, 4, 6

9 U.S.C. § 12 ..... 3, 4, 6

Rule Cited:

Supreme Court Rule 17.1 3

APPENDIX

Appendix A — Telefax Communications Re: Award of Arbitrator 1a

Appendix B — Telefax Communcations Re: Award 5a

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Danella Construction Corporation, respectfully prays that the Petition for a Writ of Certiorari filed by MCI Telecommunications Corporation be denied.

COUNTER STATEMENT OF THE CASE

As set forth in the Statement of the Case of MCI Telecommunications Corporation ("MCI"), this matter concerned mutual claims for damages pursuant to a construction contract entered into by the parties for installation by Danella Construction

Corporation ("Danella") of fiber optic cable in Louisiana. After a hearing before a panel of three arbitrators pursuant to the provisions of the contract between the parties and issuance by them of an Award of Arbitrators on July 11, 1990, Danella filed a Motion for Reconsideration which raised procedural as well as substantive reasons for reconsideration of the Award. When this Motion was forwarded to the arbitrators, the chief arbitrator sent an urgent telefax communication to the offices of the American Arbitration Association ("AAA") under whose auspices the arbitration had been conducted stating that the Award was meant to be in favor of Danella and against MCI and that the parties were inadvertently reversed when the Award was typed by AAA personnel. Appendix A at 1a. Following the arbitration hearing, the chief arbitrator had telefaxed a form of Award to the AAA offices for typing wherein Danella was recited as the prevailing party. Appendix B at 5a. The AAA staff thereupon prepared a Modification of Award of Arbitrators correctly reciting Danella as the prevailing party, and this corrected Award was executed by the arbitrators on August 20, 1990.

Following the filing of Cross-Motions for Summary Judgment, the United States District Court for the Eastern District of Pennsylvania entered an Order vacating the Modification of Award of Arbitrators and reinstating the first Award. In its opinion, the District Court decided that the arbitrators were without power to correct the clerical error set forth in the first Award, and in doing so looked to the provisions of Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, for "guidance". On appeal, the United States Court of Appeals for the Third Circuit reversed this Order and directed the lower court to reinstate the Modification of Award of Arbitrators wherein Danella was correctly recited as the prevailing party. In so ruling, the Third Circuit held that the arbitrators possessed residual authority to correct the clerical mistake set forth in the original Award.

REASON FOR DENYING THE WRIT

In its Petition, MCI has failed to satisfy any of the standards set forth in Supreme Court Rule 17.1 (a) or (c). MCI has pointed to no conflict in the Circuits which requires resolution by this Court, nor has it raised an important question of federal law which has not been but should be settled by this Court.

MCI's basic contention is that the procedural provisions of the Federal Arbitration Act ("FAA") provide the exclusive method whereby an arbitration award may be corrected. MCI then asserts that Danella was required to seek correction of the erroneous original Award by application to the appropriate District Court pursuant to Section 11 (a) of the FAA, 9 U.S.C. § 11 (a). MCI then further asserts that *any* modification of the original Award is barred by virtue of the expiration of the three month notice period set forth in Section 12 of the FAA, 9 U.S.C. § 12.

Such a position constitutes a misconstruction of the basic purpose and intent of the FAA as clearly enunciated by this Court. The Act was meant to create a body of federal substantive law of arbitrability applicable to any arbitration agreement involving interstate commerce and was not, as MCI suggests, meant to create a specific prescriptive procedure. *Volt Information Sciences v. Board of Trustees,* 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). The substantive law created by Congress in enacting this statute was in response to a then widespread judicial refusal to enforce arbitration agreements. *Volt, supra; Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). The substantive law of the statute was meant to reverse this circumstance and to implement a liberal federal policy favoring arbitration agreement notwithstanding any state substantive or procedural policies to the contrary. *Mercury Construction, supra.* This substantive law

favoring arbitration agreements and requiring their rigorous enforcement is embodied in Sections 1 and 2 of the FAA. *Volt, supra; Perry v. Thomas,* 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

It is clear that the substantive law embodied in Sections 1 and 2 of the FAA is applicable to a dispute relating to interstate commerce[1] regardless of whether litigation surrounding the dispute is initiated in state or federal court. *Perry, supra; Mercury Construction, supra.* This substantive federal law and policy was fully implemented in the instant case by virtue of the parties having jointly referred their entire controversy to arbitration pursuant to the express terms of their contract. The federal policy against frustration of arbitration agreements having been satisfied, Danella was thereupon free to employ procedures available either under federal law by way of the FAA or appropriate state and common law relative to correction and implementation of the Award of Arbitrators. Your Honorable Court has recognized the appropriateness of choosing a state forum for this purpose. *Perry, supra; Mercury Construction, supra; Keating, supra.*

In the instant case, Danella chose to enforce the Award of Arbitrators as corrected by them in state court as opposed to employing the specific procedures set forth in Sections 11 and 12 of the FAA. Under circumstances such as this, Your Honorable Court has specifically held that only Sections 1 and 2 of the FAA are applicable. *Volt, supra.*[2] As Your Honorable Court stated in *Volt, supra:*

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1. Danella has agreed that the contract at issue relates to interstate commerce.

2. The Court in that case withheld a decision as to the applicability of Sections 3 and 4 to state court proceedings. *Compare Mercury Construction, supra,* Notes 32-35, wherein it is suggested that Section 3 may also be applicable to state court proceedings.

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate.

Had Danella chosen to seek modification or correction of the Award in federal courts, then the procedural aspects of the FAA would have been applicable in their entirety. *See Mutual Fire Marine and Inland Insurance Company v. Norad Reinsurance Company, Ltd.*, 868 F. 2d 52 (3rd Cir. 1989). However, if a party such as Danella does not elect to so proceed under the procedural aspects of the FAA, it is not bound by these procedural provisions. On the contrary, it is free to seek modification of the Award from the arbitrators and enforcement of it in state courts pursuant to any procedures there applicable under state law. As the court stated in *Martin v. Youngstown Sheet and Tube Company,* 911 F. 2d 1239 (7th Cir. 1990):

> The FAA allows certain persons — parties to the arbitration — under certain conditions to apply to a district court for a confirmation, vacation, or modification of the award . . . but it does not limit the means by which these persons can confirm, vacate or modify the award to the court alone. The FAA is an enabling statute not a proscribing one. In general, it does not restrict the parties from seeking additional guidance from the arbitrator; in fact it encourages it.

There is no dispute among any of the Circuits concerning these legal principals. In arguing that the procedural sections of the FAA have preempted any state law procedures and therefore must apply to this proceeding, MCI has relied upon a slip opinion from

the United States District Court for the Southern District of New York. *American Centennial Insurance Co. v. Arion Insurance Co. Ltd.*, No. 88-1665, Slip Op. (S.D.N.Y. April 18, 1990). In that case, the court improperly relied upon *Coenen v. RW Pressprich and Company*, 453 F. 2d 1209 (2nd Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) in concluding that the procedural sections of the FAA precluded modification by arbitrators of their Award. In *Coenen, supra*, the Court did not hold that Sections 9 through 12 of the FAA must apply to any instance involving modification of an arbitrator's award. Rather, that case dealt with the substantive issue of arbitrability to which Sections 1 and 2 of the FAA apply. The Court there properly held that this issue of arbitrability was properly governed by the federal law and policy of liberal construction of arbitration clauses. The Court did not have before it, nor did it decide, any issue as to the exclusive applicability of the procedural sections of the FAA to modification and enforcement of arbitration awards.

This case involves no conflict among the Circuits concerning the applicability of the substantive or procedural aspects of the FAA to this proceeding. This case also represents a clear application by the Third Circuit of its previous decisions with respect to modification of an arbitration award to correct a clerical mistake therein as embodied in *LaValle Plaza, Inc. v. RS Noonan, Inc.*, 378 F. 2d 569, 37 A.L.R. 3rd 189 (3rd Cir. 1967). It therefore does not present an important question which needs to be settled by Your Honorable Court.

CONCLUSION

For the foregoing reasons, Danella respectfully requests that MCI's Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT J. KERNS
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Attorneys for Respondent
425 West Main Street
Lansdale, PA 19446
(215) 855-9521

APPENDIX A — TELEFAX COMMUNICATIONS RE: AWARD OF ARBITRATOR

TELECOPY COVER SHEET

GANDY MICHENER SHINDLE WHITAKER & PRATT

3500 City Center Tower II	Telephone	817/335-4417
301 Commerce Street	Metro	817/429-6268
Fort Worth, Texas 76102	Senders DID	817/878-

TELECOPY: (817) 335-6935 (PANAFAX MV-3000 AUTOMATIC)

PLEASE DELIVER TO: *Debra J. Noack*

DESTINATION NUMBER: *(214) 490-9008*

REGARDING: *DANELLA/MCI 71 110 00552 89*

OUR FILE NUMBER: *10449.010*

MESSAGE: *The final award as typed was backwards — see attached*

FROM: *Ken Gudgen*

DATE: *8/14/90*

IN CASE OF PROBLEMS, PLEASE CALL *Lori* AT 817/878-

THIS IS PAGE *1* of 2 PAGES

Appendix A

URGENT!!

Our award was in favor of Danella and against MCI. These were reversed when typed.

Appendix A

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

MCI Telecommunications Corporation

-AND-

Danella Construction Corporation — Dallas, Texas

CASE NUMBER: 71 110 00552 89

ADMINISTRATOR: Debra J. Noack

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated January 30, 1986, and having been duly sworn and having duly heard the proofs and allegations of the parties. AWARD as follows:

MCI Corporation ("Danella") shall pay to Danella Construction Corporation ("MCI") the sum of One Hundred Forty One Thousand One Hundred Sixty Dollars and Nineteen Cents ($141,160.19).

The administrative fees and expenses of the American Arbitration Association totaling $2,535.56 shall be borne as incurred by the parties, and a miscellaneous expenses totaling $142.50 shall be borne by Danella and deducted from deposits previously advanced.

Appendix A

The expenses of the arbitrators totaling $72.30 shall be borne equally by the parties and deducted from deposits previously advanced.

The above listed sums are to be paid no later than 20 days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration.

DATE: *July 2, 1990*

SIGNED:
Kenneth P. Gudgen
Kenneth P. Gudgen, Arbitrator

DATE: *July 5, 1990*

SIGNED:
Jeffrey A. Ford
Jeffrey A. Ford, Arbitrator

DATE: *July 11, 1990*

SIGNED:
Daniel J. Davis
Daniel J. Davis, Arbitrator

* * *

APPENDIX B — TELEFAX COMMUNICATIONS RE: AWARD

TELECOPY COVER SHEET

GANDY MICHENER SWINDLE WHITAKER & PRATT

[stamped]
AMERICAN ARBITRATION
ASSOCIATION
FILED
JUN 27 1990
DALLAS REGIONAL

3500 City Center Tower II	Telephone	817/335-4417
301 Commerce Street	Metro	817/429-6268
Fort Worth, Texas 76102	Senders DID	817/878-0576

TELECOPY: (817) 335-6935 (PANAFAX MV-3000 AUTOMATIC)

PLEASE DELIVER TO: *DEBBIE NOACK*

DESTINATION NUMBER: *(214) 490-9008*

REGARDING: *DANELLA*

OUR FILE NUMBER: *10449.010*

MESSAGE: *ATTACHED IS THE AWARD.*

FROM: *KEN GUDGEN*

DATE: *June 27, 1990*

Appendix B

IN CASE OF PROBLEMS, PLEASE CALL *KRISTIN* AT 817/878-0548

THIS IS PAGE *1* OF *2* PAGES

Appendix B

CASE NO. 71 110 00552 89

MCI Telecommunications

-and-

Danella Construction Corporation

AWARD

All briefs having been submitted and received, the Arbitrators, having considered the evidence and the argument of counsel unanimously AWARD the sum of $141,160.19 to Danella Construction Corporation. The administrative fee paid to the American Arbitration Association by each party is assessed against such part. All matters presented to the Panel are disposed of by this Award.